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MISCELLANEOUS:

BRIEF OF SHIPPERS NATIONAL FREIGHT CLAIM COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Shippers National Freight Claim Council, Inc. ("SNFCC"), pursuant to Rule 37 of the Rules of this Court, as its *amicus curiae* brief,[1] states as follows:

INTEREST OF AMICUS

SNFCC is a voluntary, not-for-profit organization, incorporated under the laws of the State of New York, with offices in Huntington, New York. The purpose of SNFCC is to assist its approximately 700 member firms throughout the nation in managing freight claim functions. While "freight claims" frequently involve disputes between shippers and carriers over lost and damaged cargo, they also may encompass transportation pricing disputes—for example, claims by shippers against carriers for reimbursement of "overcharges" or, as pertinent here, "undercharge" claims by carriers against shippers. SNFCC member firms utilize all modes of freight transportation in domestic and international commerce, including motor common carriers regulated by the Interstate Commerce Commission ("ICC" or "Commission").

SNFCC thus has a direct interest in the issues presented herein. It supports the position of respondent, Primary Steel, Inc. ("Primary"), and of the United States that the Eighth Circuit properly affirmed the district court's grant of summary judgment in favor of Primary, a shipper faced with undercharge claims by a bankrupt motor carrier.

Many of SNFCC's member firms have been subjected to similar undercharge claims by defunct motor carriers and their rate auditors or collection agencies. To assist its members in defending against these claims, SNFCC has formed Joint Defense Groups in more than 40 carrier bank-

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[1] Written consent to file this *amicus* brief has been granted by the Solicitor General and, through counsel, by petitioners and respondent.

ruptcy and insolvency cases. (*See* Appendix A hereto.) Collectively, the suits being handled within SNFCC's Joint Defense Groups seek more than $9 million from close to 700 defendants. Counsel for the largest collection agencies has estimated that the amount at stake in all cases presenting similar issues is approximately $200 million.[2]

SNFCC previously addressed similar issues in its *amicus curiae* brief filed with this Court on June 30, 1989, supporting a grant of certiorari in *Supreme Beef Processors, Inc. v. Yaquinto*, No. 88-1958.[3] In essence, SNFCC argued that:

1. Economic regulation of the motor carrier industry was substantially liberalized by the Motor Carrier Act of 1980 ("MCA"), Pub. L. No. 96-296, 94 Stat. 793 (effective July 1, 1980), and by subsequent changes in ICC policies and regulations designed to implement congressional intent to create a more competitive motor carrier industry.

2. The intensified competition caused carriers to negotiate discounted transportation rates, many of which, unbeknownst to the shippers, were not included in the carriers' tariffs filed with the ICC.

3. In response to the hundreds of lawsuits filed by collection agencies for defunct carriers, seeking to collect the difference between filed tariff rates and negotiated discount rates, the ICC properly exercised its rarely used reasonable practices jurisdiction under 49 U.S.C. § 10701(a) (1982). In so doing, the agency properly ruled that it would constitute an unreasonable practice for a carrier to collect

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[2] *See* Joint Motion of the Debtor and Official Creditors' Committee to Employ Secondary Freight Undercharge Auditors and to Authorize Support For the Creditors' Alliance to Protect Freight Undercharge Assets, Exhibit B at 1, filed Aug. 15, 1989 in *In re Overland Express, Inc.*, Case No. 1P88-3004 RA(J) (Bankr. S.D. Ind.).

[3] SNFCC understands that this Court is holding review of the Fifth Circuit's decision in *Matter of Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989), in abeyance pending its decision in the instant case, as suggested by the Solicitor General. Brief for the Federal Respondent, filed herein on Dec. 18, 1989 ("Fed. Resp. Br.") at 13.

more than the rate negotiated in good faith by an authorized carrier representative upon which the shipper relied. *National Indus. Transp. League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986) ("*Negotiated Rates I*"), *clarified*, 5 I.C.C.2d 623 (1989) ("*Negotiated Rates II*") (collectively, "*Negotiated Rates*").

4. This Court has declared that only the filed tariff rate may be charged "unless it is found by the Commission to be unreasonable." *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). *Accord, Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 162 (1922).

5. The legally published tariff rate is lawful only if it is reasonable. *Arizona Grocery Co. v. Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932).

6. The issue of reasonableness of a carrier's rate requires referral to the ICC when raised either in an action for reparations or by way of a defense to an undercharge claim. *United States v. Western Pac. R.R.*, 352 U.S. 59, 71 (1956); *Seaboard Sys. R.R. v. United States*, 794 F.2d 635, 639 (11th Cir. 1986).

7. The ICC's primary jurisdiction over reasonableness issues extends to motor carriers' rate-related practices as well as to the rates themselves. *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87-88 (1962); *General Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940).

8. The procedure established for judicial reference of motor carrier rate and practice issues to the ICC is available for past shipments. *National Motor Freight Traffic Ass'n v. United States*, 268 F.Supp. 90, 92 & n.3 (D.D.C. 1967), *aff'd mem.*, 393 U.S. 18 (1968).[4]

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[4] Because these points will be amply addressed in the briefs of the principal parties herein, SNFCC will not revisit them extensively here. In keeping with recently revised Rule 37.1, SNFCC instead will use these pages primarily to set forth its members' perspective on the trucking industry conditions which spawned the undercharge problem.

As Appendix A to its previous *amicus* brief, SNFCC presented descriptions, in digest form, of unreasonable carrier practices which had come to its members' attention since passage of the MCA. Appendix B to that brief listed 82 carriers which had sued shippers for undercharges, and Appendices C and D listed citations to scores of conflicting lower court decisions on the issue, the majority of which supported the ICC's policy statement in *Negotiated Rates*.

Since the filing of SNFCC's previous *amicus* brief, the list of carriers claiming undercharges has grown from 82 to 122. (*See* Appendix A to this brief.) In addition, in line with the Eighth Circuit's decision under review herein and the Eleventh Circuit's decision in *Seaboard Sys. R.R. v. United States*, 794 F.2d 635 (11th Cir. 1986), four more courts of appeals have recently rendered decisions in eight undercharge cases supporting the ICC's exercise of its reasonable practices jurisdiction in the post-1980 regulatory environment.[5] The Fifth Circuit's decision in *Matter of Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (1989), stands alone in refusing to acknowledge the Commission's primary jurisdiction in these cases.

The decision under review, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989), *cert. granted*, 110 S. Ct. 834 (1990), involves only one of thou-

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and which amply warranted the harmonization of longstanding statutory objectives achieved by the Commission in *Negotiated Rates*. SNFCC believes these observations will bear directly on the question of whether the Commission properly has exercised the discretion accorded agencies to balance broad and potentially conflicting statutory policies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[5] *Delta Traffic Serv., Inc. v. Appco Paper & Plastics Corp.*, 893 F.2d 472 (2d Cir. 1990); *Carriers Traffic Serv., Inc. v. Anderson, Clayton & Co.*, 881 F.2d 475 (7th Cir. 1989) (embracing *Inman Freight Systems, Inc. v. Boise Cascade Corp.* and *Orscheln Bros. Truck Lines, Inc. v. Cooper Indus., Inc.*); *INF, Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546 (8th Cir. 1989); *West Coast Truck Lines, Inc. v. Weyerhaeuser Co.*, 893 F.2d 1016 (9th Cir. 1990) (embracing *Delta Traffic Serv., Inc. v. Marine Lumber Co.*); *West Coast Truck Lines, Inc. v. American Indus., Inc.*, 893 F.2d 229 (9th Cir. 1990).

sands of undercharge cases now pending before the lower courts and awaiting this Court's decision on the Commission's reasonable practices jurisdiction. Some courts have formally stayed all such proceedings pending this Court's decision.[6] *Maislin* involves relatively simple factual and legal circumstances common to virtually all pending undercharge cases, *i.e.*, the parties negotiated rates or discounts with the understanding that they were or would be duly published in the carrier's tariff, but years later a third party (auditor or collection agency) claims that the carrier failed to file the agreed-upon rates in its tariff, thus arguably creating a technical undercharge under the "filed rate doctrine" of *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94 (1975).

To comprehend the magnitude of the problem confronting the Commission in its *Negotiated Rates* decisions, this Court is urged to consider the *total* transportation environment following enactment of the MCA as related hereinafter. SNFCC, drawing on the experience and expertise of its membership, believes it is uniquely equipped to assist the Court in understanding how the current undercharge issues arose, and why the corrective action taken by the ICC is not only a lawful but a commendable example of regulatory flexibility.

SUMMARY OF ARGUMENT

The undercharge issue requires the ICC to harmonize the requirement of 49 U.S.C. § 10701(a) (1982) that motor common carrier rates and related practices must be "reasonable" with the requirement of 49 U.S.C. § 10761(a) (1982) that motor common carrier rates must be published in tariffs. The MCA modified neither of these requirements; neither one may be implemented to the exclusion

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[6] *See, e.g., Carolina Motor Express, Inc. v. Delaware Valley Shippers Ass'n*, No. 89-3259(L) (4th Cir. Feb. 1, 1990); *In re McLean Trucking Co.*, Case No. C-B-86-023 (Bankr. W.D.N.C. entered Nov. 17, 1989) (administrative order staying activity in undercharge cases) (involving approximately 1,700 cases).

of the other. When a statute imposes broad and potentially conflicting requirements such as these, a regulatory agency's discretion to construe them harmoniously is at its "zenith." *Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 314 (D.C. Cir.) (per curiam), *cert. denied*, 474 U.S. 1019 (1985). The agency may change its construction of its governing statutes, even to the point of reviving previously dormant regulatory powers, so long as the change in its policy is rational and well-articulated. *United States v. Morton Salt Co.*, 338 U.S. 632, 647-48 (1950).

The ICC's accommodation, in its *Negotiated Rates* decisions, of the requirement for reasonable rates and related practices with the co-equal requirement for tariff publication is rational and well-articulated. More than that, it is a laudable example of the flexibility this Court has described as not only permissible but necessary for regulatory agencies. *See American Trucking Ass'ns v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967).

Indeed, the radical changes in the regulatory and competitive environment of the trucking industry during the last decade ultimately compelled the ICC to re-activate its authority to police unreasonable rate-related practices. From the perspective of SNFCC's members, these changes included not only the statutory revisions wrought by the MCA itself but also a host of regulatory actions affecting the mechanics of tariff filing under 49 U.S.C. § 10762 (1982), which had the effect of vastly increasing the number of tariff filings while reducing their accessibility and utility to shippers. These changes, against a background of widespread press reports and well-meaning statements by former regulators extolling the displacement of regulation by market forces in the trucking industry, fostered a widespread misperception in the shipper community that the MCA had totally deregulated motor carrier rates, and also led to widespread carrier disregard of the remaining tariff requirements. Thus, the concept of absolute constructive notice concerning all tariff filings—which petitioners' interpretation of the filed rate doctrine would

continue to impose on all motor carrier shippers—became utterly divorced from reality over the past decade.

Here, as in numerous other undercharge cases, all that the ICC has done is to determine where the loss should fall when a carrier goes out of business after consistently failing to apprise shippers of its tariff rates, and consistently misleading shippers by negotiating and accepting payment at a lower rate. In addition to determining that the carrier's later attempt to collect under the tariff rates it previously disregarded is indeed an unreasonable practice in violation of Section 10701(a), the agency has determined that any resulting economic loss should be borne by the carrier who violated the tariff publication requirement of Section 10761(a) rather than by the unsuspecting shipper. At the same time, however, the ICC's decisions show that it has been careful to limit its new policy to situations where the shipper demonstrably relied on a negotiated rate. How this deft and even-handed accommodation and vindication of *both* of the relevant statutory policies serves to undermine or nullify Section 10761(a), as claimed by petitioners (Pet. Br. at 26, 29), is not readily apparent. If the ICC is empowered to harmonize the two pertinent statutory provisions in this fashion, it follows that the court below had the power and the duty to refer this case for a reasonableness determination that only "the Commission" can make. *See* 49 U.S.C. § 11705(b)(3) (1982).

The circumstances of this case—and the thousands of undercharge cases presenting similar facts—amply illustrate why this Court tempered its statement of the filed rate doctrine in *Louisville & N.R.R. v. Maxwell*, 237 U.S. at 97, with the qualification that the filed rate must be charged and paid "unless it is found to be unreasonable." The actions of the Commission and the courts in the case under review are entirely consistent with the filed rate doctrine as so qualified. As aptly stated by the Solicitor General, "this Court's many decisions holding that a *court* may not permit an equitable defense to override the carrier's right to collect the filed rate do not affect the *Commission's* power to implement the statutory requirement

of reasonableness." (Fed. Resp. Br. at 7 (emphasis in original).) This same distinction permits early retirement of the "equitable defense" straw man with which petitioners continue to joust. (*See, e.g.*, Pet. Br. at 8, 12, 18.) The Commission in *Negotiated Rates II* disavowed its unfortunate references to equitable defenses in *Negotiated Rates I*—as it had every right to do under *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)—and properly based its resolution of negotiated rates issues on its power to correct unreasonable practices under 49 U.S.C. §§ 10701(a) and 10704(b)(1) (1982).

ARGUMENT

I. The Commission's Revised Policy On Negotiated Rates Is Well Within Its Broad Discretion To Harmonize The Tariff Publication Requirement With The Co-equal Requirement For Reasonable Practices Relating To Carrier Rates.

Because the district court referred this case to the ICC for consideration pursuant to the policies announced by the agency in *Negotiated Rates*, and then upheld Commission findings made pursuant to those same policies, this case necessarily turns on whether the Commission was empowered to adopt those policies. Answering that question in the negative, petitioners ascribe primacy to the long-standing requirement of Section 10761(a) that motor common carrier rates be published in tariffs. In so doing, petitioners emphasize that Congress did not disturb the tariff requirement when it enacted the MCA—ignoring the equally obvious fact that Congress likewise did not disturb the long-standing requirement of Section 10701(a) that motor common carrier rates and related practices must be reasonable in order to be lawful.

The problem before the Commission and this Court, however, cannot be resolved by sterile attempts to invent statutory hierarchies where none exist. The fact is that Congress neither anticipated nor addressed the question of how Sections 10761(a) and 10701(a) might be harmo-

nized in today's transportation environment, where shipper access to filed tariffs has become difficult at best (*see infra* Part II) and where carrier disregard of tariff requirements appears to have become rampant (*see infra* Part III). Here, as in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (footnote omitted), "Congress has not directly addressed the precise question at issue," so that "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Indeed, to the extent that the provisions of Sections 10701(a) and 10761(a) impose broad requirements that might appear facially in conflict, "the agency's interpretive domain is at its zenith and the judicial license at its nadir." *Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d at 314.

The factual parallels between *Central & Southern* and this case are instructive. There, the District of Columbia Circuit had to determine whether the MCA's generally applicable, pro-competitive revisions to the transportation policy of 49 U.S.C. § 10101(a) (1982) permitted the Commission to exempt all motor *contract* carriers of property[7] from tariff filing requirements under provisions of 49 U.S.C. § 10761(b) (1982) that the MCA did not touch. As the District of Columbia Circuit noted, "legislative inaction" in that case was a "particularly ambiguous and unreliable indicator" because, "[w]hile Congress did not tamper with the tariff-filing requirements, neither did it amend the broadly-worded exemption provisions." 757 F.2d at 317. Under those circumstances, the Commission was entitled to considerable latitude in construing pre-existing statutory language by reference to the generalized transportation policy provisions that Congress did amend. *Id.* Because "[t]he Commission amply grounded its broad exemption in the newly-revised national transportation pol-

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[7] Contract carriers provide dedicated equipment and/or tailored service to particular shippers under separately negotiated terms and conditions (*see* 49 U.S.C. § 10102(15) (1982)), whereas common carriers normally service groups of shippers under standard terms and conditions.

icy," *id.* at 318, the exemption was sustained even though it was sharply at variance with the Commission's past practice of narrowly construing the contract carrier tariff exemption provisions of Section 10761(b).

Demonstrably, a similar application of the *Chevron* principle is appropriate here. It may be true that the transportation policy of Section 10101(a) is not an independent source of ICC rulemaking authority. *See Global Van Lines, Inc. v. Interstate Commerce Commission*, 714 F.2d 1290 (5th Cir. 1983). Here, however, Section 10101(a) surely provides the best available guidelines for harmonizing the statute's substantive commands regarding rate publication and reasonableness, and for applying them to current industry conditions. The Commission's *Negotiated Rates* decisions amply explain the transformed competitive and regulatory environment faced by motor common carriers and their customers, and amply justify the Commission's expanded use of its "reasonable practice" powers to address the undercharge problem. Because the Commission properly found "[t]he dogmas of the quiet past . . . inadequate to the stormy present," it necessarily had to "think anew and act anew."[8] So long as the agency acted within the confines of Sections 10701(a) and 10761(a)—as it patently did—its actions were in the best tradition of agency regulation, which is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'ns v. Atchison, T.& S.F. Ry.*, 387 U.S. at 416. The conditions which compelled the Commission to act are detailed in the next section of this brief.

II. The Commission's Exercise Of Its Reasonable Practice Jurisdiction With Respect To Negotiated Rates Was Warranted By Changed Industry Conditions After Enactment Of The Motor Carrier Act Of 1980.

The Commission's change of policy in its *Negotiated Rates* decisions, as implemented by the district court and

[8] A. Lincoln, Second Annual Address to Congress (Dec. 1, 1862).

the Eighth Circuit in the case under review, is the logical end result of the radically transformed regulatory and competitive environment in which the motor carrier industry existed during the nineteen eighties. By describing how that transformation occurred, and how it eventually served to cripple many shippers' ability to access filed rates, SNFCC hopes to contribute uniquely to this record by demonstrating why events ultimately compelled the Commission to address the undercharge issue as it has.

In order thus to demonstrate the rationale behind the decisions in *Negotiated Rates*, SNFCC will address the changes wrought by the MCA itself; the even greater changes subsequently made by the ICC in its tariff filing regulations and procedures; the ensuing proliferation of tariff filings and the decreased utility of those filings to the shipping public; and the widespread resulting misperception—fed even by public statements of former ICC members—that the motor common carrier tariff filing requirement had become a dead letter. It will be SNFCC's purpose, in short, to delineate the reality behind the Commission's well-taken observation in *Negotiated Rates II* that it had become "extremely difficult for shippers to determine, prior to an initial movement, whether the agreed-upon rate is actually on file." 5 I.C.C.2d at 633.

A. The 1980 Act Reduced Market Entry Barriers And Called For More Pro-Competitive Enforcement Of *Existing* Motor Common Carrier Rate Regulations.

The primary objectives of Congress in the MCA were threefold. Congress sought to liberalize the Commission's regulation of entry into the motor carrier industry, and it also sought to reduce the role of antitrust-immune collectively made rates in setting industry price levels, while reemphasizing the promotion of competition as an objective of all ICC motor carrier regulations.

To open up entry into the industry, the MCA principally reduced the burden of proof imposed on applicants for motor carrier operating authority (§ 5), mandated an ex-

pedited procedure for broadening previously issued operating authorities (§ 6) and expanded previous exemptions from the requirement for operating authority (§ 7). With respect to motor carrier pricing, the MCA principally established a zone of ratemaking freedom within which common carrier tariff changes could not be protested (§ 11), expanded the ability of common carriers to offer limited liability rates (§ 12) and reduced the scope of antitrust immunity for collective ratemaking activities (§ 14). As already noted, however, the MCA eliminated neither the requirement that common carrier rates be filed in tariffs nor the requirement that such rates and related practices be reasonable. With respect to transportation policy generally, Section 4 of the MCA amended 49 U.S.C. § 10101(a) so as to require reemphasis of the role of competition in ICC administration of all aspects of motor carrier regulation, including those changed by other sections of the MCA as well as those not changed.

Thus, the MCA was not a measure for total deregulation of motor carriers. Rather, its intended effect might best be described as regulatory detente.

B. In An Effort To Implement The General Pro-Competitive Purposes Of The 1980 Act, The Commission Radically Altered Its Tariff Filing Regulations And Procedures.

Correctly anticipating that the reduced role for collective ratemaking in the motor carrier industry would lead to a proliferation of independent rate filings, the ICC adopted a series of regulatory changes intended, without doubt, to facilitate independent filings and foster price competition as mandated in Section 4 of the MCA. While the actual effects of some of these measures were less salutary than their intended effects (*see infra* Part II.C), the relevant point for present purposes is not the legality or propriety of the changes, but rather their existence in fact.

Among the earliest of the Commission's movements in this direction was its seemingly innocuous announcement in 1980 that it no longer would require newly authorized

motor carriers to certify that they had tariffs on file as a precondition to actual license issuance.[9] This measure eliminated a major administrative tool for ensuring that the many new entrants attracted into the industry by the MCA would actually file tariffs before commencing operations.

As the pace of change in tariff filing regulations accelerated during the nineteen eighties, the Commission abolished tariff requirements for motor contract carriers;[10] permitted common carriers to make reduced rate tariffs effective one day after filing;[11] allowed the filing of common carrier rates limited in their applicability to a single named shipper;[12] repealed regulations which had required tariffs to include alphabetical indexes of commodities and locations for which rates were named;[13] abolished prior requirements that rate increases and reductions in newly filed tariffs be highlighted by special symbols;[14] and permitted common carriers to make rates applicable to shippers identified in tariffs only by numerical codes, without including in the tariff any index decoding the numbers.[15]

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[9] *Rescission of Regulations Governing Certification of Rates or Fares Covering New Operating Authority*, No. 37013 (Sub-No. 1) (I.C.C. served Sept. 22, 1980).

[10] *Exemption of Motor Contract Carriers From Tariff Filing Requirements*, 133 M.C.C. 150 (1983), *aff'd sub nom. Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301 (D.C. Cir.) (per curiam), *cert. denied*, 474 U.S. 1019 (1985).

[11] *Short Notice Effectiveness for Independently Filed Motor Carrier and Forwarder Rates*, 1 I.C.C.2d 146 (1984), *aff'd sub nom. Southern Motor Carriers Rate Conference v. United States*, 773 F.2d 1561 (11th Cir. 1985).

[12] *Rates For a Named Shipper or Receiver*, 367 I.C.C. 959 (1984).

[13] *Revision of Tariff Regulations, All Carriers*, No. 37321 (I.C.C. served Oct. 1, 1984), 1984 Fed. Carr. Cas. (CCH) ¶ 37,129.

[14] *Tariff Improvement*, 1 I.C.C.2d 760 (1985).

[15] *Outstanding Relief for "Shipper Account Codes"—Individual Motor Common Carriers and Freight Forwarders*, Special Tariff Authority No. 86-639 (I.C.C. decided Mar. 28, 1986).

Taken in combination, these changes in tariff regulations would have made it substantially more difficult for shippers to ascertain pertinent filed rates even if the volume of tariffs filed had remained at pre-1980 levels. As demonstrated next, however, the shippers' problem was compounded by a proliferation of such filings as regulatory detente took hold.

C. The Volume Of Tariff Filings In The New Environment Soon Overwhelmed The Commission's Reduced Staff And Impaired The Utility Of The Commission's Tariff Files.

Even prior to 1980, the ICC's administrative steps in the direction of reduced motor carrier regulation[16] had prompted an increase in tariff filings. The Commission admittedly had found it difficult to keep pace with the filings and examine them for compliance with tariff regulations.[17] This problem had led the Commission to announce on September 27, 1979 that it was discontinuing the practice of examining every filed tariff for compliance with its regulations.[18] By early 1981, the Commission reported that "the volume of tariff matter received [had] caused the tariff library maintenance function to overwhelm the examination process."[19]

The deluge of new tariffs only increased after enactment of the MCA. Whereas a total of 397,024 tariffs had been filed with the Commission in fiscal year 1978,[20] tariff filings increased to 1,200,000 in fiscal year 1984.[21] The number of carriers subject to the Commission's jurisdiction

[16] *See* H.R. Rep. No. 96-1069, 96th Cong. 2d Sess. 13 (1980).

[17] 1979 ICC Ann. Rep. 69.

[18] *Tariff Integrity Board*, Ex Parte No. 367 (I.C.C. served Sept. 27, 1979), 1979 Fed. Carr. Cas. (CCH) ¶ 36,906.

[19] 1980 ICC Ann. Rep. 65.

[20] 1979 ICC Ann. Rep. 69.

[21] 1984 ICC Ann. Rep. 70.

grew during this period from 17,000 to over 36,000.[22] At the same time, the practical availability and utility of filed tariffs to the shipping public was further reduced by the closure of the Commission's public tariff file effective September 14, 1981 (after which public users had to share the official tariff file room with Commission staff),[23] and by reduction of the ICC's budget for tariff maintenance and examination. For example, ICC staff hours devoted to examination of tariffs for compliance with regulations were slashed from 137,000 in fiscal year 1984 to an estimated 3,000 in fiscal year 1986,[24] even though the volume of tariff filings was increasing at an estimated rate of six percent per year.[25] Between fiscal years 1983 and 1985, staff years allocated to "Rate Regulation Activity: Motor" dropped from 41 to an estimated level of only 29.[26]

The negative impact of budgetary and staff reductions on the Commission's ability to maintain the official tariff file is well illustrated in two recent pleadings filed by carriers and carrier trade groups before the ICC. In *Regular Common Carrier Conference—Petition for Declaratory Order—Range of Discounts and Customer Account Codes*, No. MC-C-30117, a trucking trade group petition submitted on July 12, 1988 demonstrates, through a sample of almost 40,000 tariff pages filed with the Commission in a single week (May 23 through 27, 1988) that the Commission's understaffed and overwhelmed Section of Tariffs has been accepting numerous "write-in" or "trigger" tariff filings

[22] Testimony of Chairman Reese Taylor before the Government Activities and Transportation Subcommittee of the House Committee on Government Operations, Sept. 12, 1985.

[23] Traffic World, Sept. 7, 1981, at 34.

[24] Interstate Commerce Commission, Budget Estimates: 1986, at 55.

[25] *Id.* at 54. Other year-to-year comparisons during this period are rendered difficult by changes in presentation of Commission budget data from one year to the next.

[26] Interstate Commerce Commission, Budget Estimates: 1985, at 25. Between fiscal years 1979 and 1984, total ICC staff positions decreased from 2,040 to 1,158. 1984 ICC Ann. Rep. 119.

negotiated rates will be enormously helpful to the successful outcome of this litigation. Thank you, and I'm available for any questions you may have.

CHAIRMAN GRADISON: Thank you. Commissioner Phillips, I wonder if you'd take over at this point.

COMMISSIONER PHILLIPS: Thank you very much, Madam Chairman. As was mentioned, Chairman Gradison asked me to coordinate the Commission's efforts to establish a framework for discussing potential Commission action with respect to negotiated rates. In effort to develop a consensus on what further steps the Commission should take in this area, I have conferred individually with each of my colleagues.

I am pleased to report that we have identified several options, we have considered the Commission's experience to date under the existing interpretation of our MC-177 policy, the treatment of these cases by the courts, and the comments of the parties in [10] MCC-30090. My colleagues and I agree that further Commission action is needed.

We have identified six options. Before we discuss and vote on them, I would like to describe briefly each of these options. I believe that a consensus exists for the first four options. On the fifth option, dealing with the Commission's disposition of the NIT League's declaratory order petition, there now appears to be a difference of opinions among my colleagues.

Likewise, a consensus has not yet been reached on a sixth option, which concerns procedures by which the Commission would implement any decision taken here today. Despite the fact that we have not reached a consensus, the level of interest expresed by my colleagues on the sixth option made it desirable to include it for discussion.

The first option we have identified is to reopen on our own motion Ex Parte No. MC-177 for further clarification and enunciation of our policy regarding negotiated rates cases. As Director Mackall and General Counsel

Burk have pointed out, since our 1986 decision in Ex Parte MC-177 and subsequent clarifying decisions, the Commission has gained experience with negotiated rates cases. The Commission, as well as the courts, have decided a number of these cases.

This process has served to identify several areas in which the policy enunciated in MC-177 may require clarification [11] and strengthening. One of these areas, which General Counsel Burk has clearly described, is the split among the courts over the propriety of referring negotiated rates cases to the Commission. The split seems to stem, at least in part, from some misinterpretation of the Commission's statement in MC-177.

In that case, the Commission stated that it would provide advisory opinions on negotiated rates cases referred to us by the courts. Reopening MC-177 would permit the Commission to address this misinterpretation and to strengthen the policy outlined in MC-177. It would also allow us to establish primary jurisdiction over negotiated rates cases. Reopening MC-177 would also permit us to clarify other areas of our MC-177 policy, including whether the Commission will accept negotiated rates cases for decision without prior referral by the courts, and whether those cases should continue to be handled on a case by case basis.

If the Commission votes to approve the reopening of MC-177, our second option is to clarify that the Commission's opinions in negotiated rates cases will represent the exercise of its primary jurisdiction and thus are binding and only subject to judicial review under the "arbitrary and capricious standard."

This option is intended to address the split among the courts identified by the General Counsel and to strengthen the legal posture of shippers who seek to rely on the [12] Commission's MC-177 policy in obtaining relief in negotiated rates cases.

The third option we have identified is for the Commission to amend the policy outlined in MC-177, to permit Commission consideration of negotiated rates cases with-

out court referral. The purpose of this proposal is to provide an additional procedure by which shippers faced with potential undercharge claims could seek relief.

Under this procedure, a shipper who is notified of possible liability for undercharges claimed by a motor carrier could seek a declaratory order from the Commission determining whether collection of the alleged undercharges would be an unreasonable practice, even if the carrier had not instituted court proceedings.

The goal of this option is to encourage resolution of negotiated rates cases before cases are filed in the courts, to encourage private resolution during the pendency of cases that are filed, and to simplify those negotiated rates cases that do proceed to adjudication in the courts. This proposal is consistent with the Commission's authority under the Administrative Procedure Act; that is, to issue declaratory orders in order to terminate controversies or to remove uncertainties.

The fourth option is whether the Commission should continue to handle negotiated rates cases on a case by case [13] basis. In MC-C-30090, the NIT League and others have urged the Commission to adopt a declaratory order declaring in general terms the circumstances when the collection of alleged undercharges would constitute an unreasonable practice.

The NIT League's proposed solution offers a seemingly straightforward approach to negotiated rates cases. If adopted, however, it would leave the factual determination as to whether any particular set of facts amounts to an unreasonable practice to the courts.

In effect, the Commission would be called upon to exercise its expertise in determining what constitutes an unreasonable practice in only a generalized way. Therefore, it is not clear whether this approach would resolve the split among the courts as to the appropriate resolution of negotiated rates cases. Nor is it clear that this approach would be sufficiently persuasive to a court to increase the probability that a shipper making the types

of showings required by such a declaratory order would prevail.

For this reason, I believe there is sentiment among most Commissioners to continue to handle negotiated rates cases on a case by case basis. If the Commission votes to reopen and clarify Ex Parte No. MC-117, and to continue to handle negotiated rates cases on a case by case basis, a fifth option for the Commission's consideration is whether the petition in MCC-30090 should be held in abeyance for further consideration [14] based upon shipper, carrier and Commission experience following implementation of the initiative adopted by the Commission here today.

As I mentioned, the proposal for a declaratory order in MCC-30090 is a valid response to recent developments in negotiated rates cases. Accordingly, I do not believe that there is a consensus among my colleagues to deny the petition. As of last Friday afternoon when I circulated the voting sheet now before the Commission, there appeared to be a consensus in favor of holding the NIT League petition in abeyance at this time.

I have since been made aware that this is in fact no longer the case. However, it appears that there is a majority that believes that continued use of the case by case procedure may be more effective in obtaining favorable judgments in negotiated rates cases. By holding the petition in MCC-30090 in abeyance, the Commission will be able to assess the progress made under the policies we adopt here today and to reconsider adoption of the MCC-30090 petition if it appears desirable in the future.

The sixth option, also on which consensus has not been reached, concerns the mechanics of the Commission's implementation of the decisions we take today. Under current procedures, the negotiated rates case docket has been handled expeditiously by the Commission's Office of Proceedings. [15] However, if the Commission adopts the five options I just outlined, the potential exists for a greatly expanded case load.

Under this option, the Offices of General Counsel, Proceedings and Hearings would be directed to develop a docket management plan for the Commission's handling of future negotiated rates cases. This option is not intended to establish a burdensome new procedure for the handling of negotiated rates cases, or lead to the creation of new evidentiary requirements.

Rather, it is intended to ensure continued expeditious handling of these cases, regardless of the volume of cases received and to encourage the best use of Commission resources, including administrative law judges in meeting this goal. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you, Commissioner Phillips. Are there opening statements by any individual members of the Commission? Commissioner Lamboley?

COMMISSIONER LAMBOLEY: I guess I would be next. I want to—thank you, Madam Chairman. I want to commend Commisisoner Phillips for the energy and consideration she's given to the problems that have been visited on the industries following our adoption of MC-177. I think that Commissioner Phillips has demonstrated considerable imagination and thoughtfulness in approaching the variety of problems and the [16] various options that one could consider as appropriate.

In this case, I think that for my own part, I'd feel very comfortable in voting yes for all of the options and I'll briefly say why. I think it's obviously important for us to reopen and clarify MC-177 to do three things at the outset. First, make clear that our claim to jurisdiction is one of primary, if not exclusive, jurisdiction for the purpose of interpretation of the Interstate Commerce Act provisions as it relates to unreasonable practice.

Secondly, to remove from the procedural requirement, the court referral, which I believe has been a barrier in some measure, to having cases filed here initially. Thirdly, I believe that if we proceed in appropriate fashion, the courts will accord to us as having done our

primary jurisdictional responsibilities in such a way that the judicial review under ordinary standard would be accorded to our decisions.

I think further that we should continue to handle the cases on a case by case basis, and I feel comfortable that we should perhaps hold in abeyance the MCC-30090 for the purpose of being able, as Commissioner Phillips pointed out, to get a better sense of what now is happening as those cases would be developing before us, and not as cases developed in judicial forums, because they develop in different ways and sometimes non-transportation elements become more critical than the transportation elements, which are our responsibility.

[17] I think it would be advisable, and I would suggest, and attempt to urge my colleagues that we consider holding the NIT League petition in abeyance for the reason that we could bring the information more current in a period of six to nine months, would be a benchmark of time that I would have in mind in which to perhaps make an assessment then of what we've got in terms of the cases that have been filed, and the dispositions of the cases and the issues that have been joined by initial pleadings in proceedings before the Commission.

I think after that period of time, if it's possible, it might very well be that we adopt a policy statement along with a procedural companion provision which would suggest that if you meet the criteria of the policy statement, that an initial pleading demonstrating that might entitle the applicant who files the complaint or the petition to immediate relief, without much further, unless it is contested, on any serious and factual dispute in any way.

Now that's simply my general view as to the NIT League petition, which I think raises a number of critical issues. Based upon the experience that has been going on in judicial forums, I think however it's incumbent upon us in addition to the experience of judicial forums, to develop our own experience before we make an ulti-

mate decision about what a declaratory statement might be. But I do think that down the road, we might very well be able to visit and visit it far more [18] responsibly.

Finally, I think that what is offered in the suggestion of item number 6 is simply working through a procedural mechanism by which if there is a concern that we may be flooded with a large number of cases on the initial filing, that we have a procedure in place in which we can manage the docket and move them promptly and expeditiously.

We have recognized in the past that many of these have been fact-bound cases, and in those instances where it does appear to be fact-bound, it seems to me that there is an easy and efficient way of developing the record. Bundling some cases, which no doubt may come in from what the court records reflect. Frequently, there is a single carrier but a multiplicity of similarly situated claims that are involving a number of shippers, but only one carrier. I think it's quite possible to work out a scheme of docket management and control to handle all of those in a meaningful way.

Plus, giving the people who are able to develop the pattern early on, the opportunity to indicate that the carrier's circumstances may be more repetitive than perhaps fact-bound in subsequent cases. For that reason, I think it's incumbent, and wholly appropriate, that we develop the appropriate mechanism and I think the office of Proceedings and the Office of Hearings and the General Counsel's office are very capable of developing that. [19] I would make one final observation, and that is the Office of Hearings has in cases in which we've had, some difficult times in developing the record. It's performed quite admirably and I think it's terribly important that it not become a forum, if you will, to extend time limits, to otherwise be dilatory or otherwise create a paper record of size and volume beyond the circumstances.

I would point out that in such cases as the Santa Fe Southern Pacific divestiture of the SP, the ALJ's office was terribly important in developing the record on that as well as with the investigation into the Trailer Train question and a number of other cases. I've been quite pleased with respect to the docket management and control that the Chairman has requested under the rate cases.

The Office of Hearings has been more than able to bring those cases to fruition, at least to the point where the parties' negotiations are tracking along with the procedural schedule, in which disposition is ultimately going to be made. In short order, what that does is keep people's feet to the fire and it keeps them focused on the issues and doesn't let the cases wander. I think that's a terribly important ingredient of it. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you, Commissioner Lamboley. Commissioner Andre, do you have any remarks you'd like to open with?

[20] COMMISSIONER ANDRE: Yes, Madam Chairman. In October of 1986, the Commission in Ex Parte No. MC-177 issued a policy statement which established that shippers could assert equitable defenses in undercharge cases, and that if the shipper could also show that the carrier engaged in an unreasonable practice, the ICC would determine that the undercharge claim did not have to be paid.

At that time, it was my hope that the issuance of that policy statement would alleviate the problems that shippers were facing. However, it is becoming increasingly clear that the problem has not been resolved. Over 75 cases, perhaps approaching 100, involving approximately $10 million have thus far been referred to the ICC and the Commission has favored the shipper in almost every one of these cases.

Unfortunately, many courts have refused to follow our ruling and there are thousands of other cases which have

either been voluntarily settled, tried and lost, or are currently pending. It is estimated that the shipping community is facing up to $30 million in alleged undercharge bills.

It is my view, a view which I believe the majority supports, that there are two aspects of the Ex Parte No. MC-177 policy which have created this confusion. The first is the requirement of court referral and the second is the language of our decisions which implies that our decisions are merely advisory.

[21] Accordingly, I propose that Ex Parte No. MC-177 should be clarified to incorporate the following three points. Number one, that the Commission will exercise primary jurisdiction under the unreasonable practices provisions of the Interstate Commerce Act. Number two, that the Commission will eliminate the requirement of court referral and number three, that the decisions will no longer be characterized as advisory.

While there are certainly other ancillary issues which need to be resolved, our purpose today should not be to place blame, point fingers or take credit, but rather our purpose should be to sit down, discuss these aspects, reach a consensus, resolve the problem to the best of our ability, and produce a new policy statement reflecting that consensus. Thank you, Madam Chairman.

CHAIRMAN GRADISON: Thank you. Mr. Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Thank you, Madam Chairman. I'd like to join my colleagues in praising Commissioner Phillips and this spirit of collegiality and due diligence that she has brought these issues together before us today.

I've written several memorandums as it relates to MC-177 cases, and in the interest of time I won't expand beyond that in my memorandums that I've submitted to my colleagues and are available to the Commission watchers. In that regard, I am prepared to vote yes on all six issues.

[22] CHAIRMAN GRADISON: Thank you, Vice Chairman Simmons. I've strongly supported the Commission's past effort to rectify the problem of negotiated rates. We'd hoped that earlier steps that we took would resolve this problem. While they were a step in the right direction, we know that the problem persists and that the Commission must move forward with further measures if shippers are ever going to be extricated from this dilemma.

I fully support the proposition that the Commission must clarify its position with regard to its primary jurisdiction over these negotiated rates issues. Because the problem is so great, I'd go a step further than speaking only through 177.

I would also issue a rule which unequivocally sets forth the Commission's standards for determining when a shipper is entitled to a waiver of undercharges due to an unpublished but negotiated motor carrier rate. I'm supportive of any and all administrative measures which we can take to deal with these negotiated rates problems and am open to any suggestions for further action by this Commission. Finally, I continue to believe that the cleanest, most effective way to eliminate the problem is through legislation.

To open the discussion further, with regard to Commissioner Lamboley's statement that we need to build a record of our own experience before we issue a policy [23] statement, I'm of the opinion that with the 75 to the 100 cases we've issued, though they have been referred to us by the courts, this agency has never seen a negotiated rate it didn't like. We might just as well say that in a policy statement, both in of the 177 and the MCC-30090 proceedings, and move forward in that regard.

With regard to the addition of ALJs into the process, we have a one-step process today. We have a fine ALJ and Office of Hearings, and I agree that if the docket

becomes so voluminous that we are overwhelmed, that use of an ALJ might be the solution.

But for the time being, let's not take a one-step process and turn it into a two-step process. It seems to me we're all in agreement on that. I think that the language in the voting sheet it's pretty clear that we will work together with the GC's office. Proceedings and Hearings, to develop a flexible docket management plan. It seems to me that's the sort of unanimous endeavor that we undertake every day in working on managing our docket. I fail to understand why it requires a vote.

Having said that, are there any comments?

VICE CHAIRMAN SIMMONS: Yes, I would like to comment, Madam Chairman. As a member of the Commission, I certainly am not a clone for any 177 case that I didn't like. I like to think that each one of my votes is objective, with careful [24] thought, and not predetermined by any such action. That's the way I will approach these cases, as they're submitted to us on a case by case basis.

CHAIRMAN GRADISON: Commissioner Andre?

COMMISSIONER ANDRE: Yes. I have a question for Ms. Mackall, with regard to handling these cases in the Office of Proceedings. Isn't there a more streamlined way that you could be handling these cases, and thereby forego the necessity of bringing in ALJs?

MS. MACKALL: There certainly are different thing we can do. We haven't needed to look to them yet, because the docket is so small that we can handle it very easily with our current staff. If it were to balloon, we would start looking at other things to do. For example, shortening the decisions, batching them for a vote as the Commissioners have already mentioned, things like that.

COMMISSIONER ANDRE: So that would thus streamline the process?

MS. MACKALL: Yes.

COMMISSIONER ANDRE: Furthermore, isn't it true that if we were to bring ALJs into the picture, that they have an automatic delay built into their appellate process?

MS. MACKALL: Well, as the Chairman said, it is two steps. They issue an initial decision and then there's the right of appeal. The right of appeal involves the appeal, the [25] reply and then the Commission's decision on the appeal.

COMMISSIONER ANDRE: So it appears to me, Madam Chairman, that bringing the ALJs into the picture has a downside risk to it as well as the possible positive aspects of it, inasmuch as there's a real potential there for increasing regulatory lag, which I don't think you want to do and I don't think this Commission wants to do.

CHAIRMAN GRADISON: Commissioner Lamboley, did you have a comment?

COMMISSIONER LAMBOLEY: No.

CHAIRMAN GRADISON: Okay. Well, why don't we go ahead and vote? Any further comments before we call the roll? I'm going to suggest, in view of the statements that have been made here today, that we vote on items 1 through 4 at the same time. Those in attendance here have the voting sheet before them.

This covers the issue of whether the Commission should reopen Ex Parte MC-177. If the answer to that is yes, should the Commission clarify Ex Parte 177 to explain that the Commission's options represent the exercise of it sprimary jurisdiction and thus are binding and only subject to judicial review under the arbitrary and capricious standard.

The third item is if the answer to 1 is yes, should the Commission modify Ex Parte MC-177 to provide that the Commission will accept negotiated rates cases without court [26] referrals, and the fourth item, should the Commission continue to handle negotiated rates cases on a case by case basis.

COMMISSIONER PHILLIPS: Madam Chairman, before you do that, could I ask a procedural question of General Counsel Burk? Specifically, could you let us know whether or not reopening of MC-177 would be appropriate and whether we would require any type of additional comment, notice, or anything.

MR. BURK: It would be appropriate. It would not require additional comment. You are clarifying what you have already stated. It doesn't require any taking of comment from other people to let the public know what it is you meant by 177.

COMMISSIONER PHILLIPS: Thank you.

CHAIRMAN GRADISON: Is the Commission prepared to vote?

VICE CHAIRMAN SIMMONS: Yes.

CHAIRMAN GRADISON: Madam Secretary?

SECRETARY MCGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY MCGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY MCGEE: Commissioner Andre?

COMMISSIONER ANDRE: Yes.

SECRETARY MCGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

[27] SECRETARY McGEE: Chairman Gradison?

CHAIRMAN GRADISON: Yes.

[Questions 1 to 4 answered in the affirmative, 5 to 0.]

CHAIRMAN GRADISON: Now with regard to item 5, I've made my position clear. Are there any other comments on item 5?

[No response.]

CHAIRMAN GRADISON:—Hearing none, please call the role.

SECRETARY McGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY McGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY McGEE: Commissioner Andre?

COMMISSIONER ANDRE: No.

SECRETARY McGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

SECRETARY McGEE: Chairman Gradison?

CHAIRMAN GRADISON: I vote no because I would prefer to go ahead and respond with a rule at this time in addition to handling these cases on a case by case basis.

[Question 5 answered in the affirmative, 3 to 2.

CHAIRMAN GRADISON: Item number 6, if negotiated rate cases will continued to be handled on a case by case basis, [28] should the Commission direct the Offices of General Counsel, Proceedings and Hearings to develop a flexible docket management plan that will provide for the participation of the Commission's administrative law judges in resolution of negotiated rate cases.

SECRETARY McGEE: Commissioner Phillips?

COMMISSIONER PHILLIPS: Yes.

SECRETARY McGEE: Commissioner Lamboley?

COMMISSIONER LAMBOLEY: Yes.

SECRETARY McGEE: Commissioner Andre?

COMMISSIONER ANDRE: No.

SECRETARY McGEE: Vice Chairman Simmons?

VICE CHAIRMAN SIMMONS: Yes.

SECRETARY McGEE: Chairman Gradison?

CHAIRMAN GRADISON: I vote no. I think that we can handle this on a regular case by case basis, and that a vote is not required to include administrative law judges in the procesing of cases should we choose to do so at a later date.

[Question 6 answered in the affirmative, 3 to 2.]

CHAIRMAN GRADISON: The Commission has tried yet again to take an action with regard to our negotiated rates problem. A draft decision reflecting today's vote will be prepared and circulated for notation voting. With that—

pricing, while tariff filing and availability have become loosely ordered carrier duties, the Commission's renewed vigor in enforcing reasonableness requirements fills a compelling need. If the law of the marketplace that honors contracts were deprived of its sanctions by the filed rate doctrine, and the Commission's authority to grant relief were denied, nothing would be left to afford a legal remedy. What would remain in the marketplace is anarchy in transportation pricing.

WHEREFORE, SNFCC urges that the Eighth Circuit's decision in favor of the respondent shipper be affirmed.

Respectfully submitted,

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April 2, 1990

APPENDIX

APPENDIX A

LIST OF 122 CARRIERS WHICH HAVE FILED UNDERCHARGE CLAIMS AGAINST SHIPPERS BASED ON NEGOTIATED BUT UNFILED RATES

ADAMS EXPRESS

*ADVANCE UNITED EXPRESSWAYS, INC.

ALLSTATE

AMERICAN CARRIERS, INC.

*AMERICAN FREIGHT SYSTEMS, INC.

ANDERSON MOTOR LINES

*ATLANTIS EXPRESS

B. B. & B. TRANSPORTATION

B.D.L. TRUCKING

B. F. WALKER

BRANCH MOTOR EXPRESS COMPANY

BREMAN'S EXPRESS COMPANY

BRIGGS TRANSPORTATION COMPANY

*BRINKE TRANSPORTATION CORPORATION

BRITON MOTOR SERVICE, INC.

*C & H NATIONWIDE

CALIFORNIA MOTOR EXPRESS

*CAMPBELL SIXTY-SIX EXPRESS, INC.

*CANNY TRUCKING COMPANY, INC.

CARAVAN REFRIGERATED CARGO

CAROLINA MOTOR EXPRESS, INC.

Note: SNFCC has established Joint Defense Groups for shippers facing undercharge claims from carriers marked with an asterisk.

CATAWBA VALLEY MOTOR LINES
*CERTIFIED CARRIERS OF AMERICA
CHIEF FREIGHT LINES
CLAIRMONT TRANSFER COMPANY
CLAXTON TRANSPORT
*COLISEUM CARTAGE COMPANY, INC.
*COLUMBIA NAVIGATION
*CROSS E TRANSPORTATION
CW TRUCKING
DEPENDABLE CARTAGE AND TRANSPORTATION CO.
DUDLEY TRUCKING COMPANY
DUNKLEY TRANSPORTATION COMPANY
EAGLE EXPRESS COMPANY
EAZOR SPECIAL SERVICES, INC.
*EXPRESS FREIGHT LINES
*EXPRESS TRANSPORTATION COMPANY
FELDSPAR TRUCKING COMPANY
*FREIGHTCOR SERVICES, INC.
G.M.W., INC.
GARLEPIED TRANSFER
GATEWAY TRANSPORTATION COMPANY, INC.
GLENDENNING MOTORWAYS, INC.
GORDON TRANSPORTS, INC.
GREENSTREAK SERVICES
HAGEN, INC.
*HALLS MOTOR TRANSIT COMPANY
HALLS SYSTEMS, INC.
HIGHWAY EXPRESS, INC.

Note: SNFCC has established Joint Defense Groups for shippers facing undercharge claims from carriers marked with an asterisk.

I.C.X.
I.M.L. FREIGHT, INC.
INTERSTATE MOTOR FREIGHT SYSTEM
INDIANHEAD TRUCK LINES
INF, LTD.
INMAN FREIGHT SYSTEMS
INTERNATIONAL DISTRIBUTION CENTERS
*LEE WAY MOTOR FREIGHT, INC.
*MAISLIN INDUSTRIES, U.S., INC.
*MANLEY TRUCK LINES, INC.
*MCLEAN TRUCKING COMPANY
MERCHANT STOR-DOR FREIGHT SYSTEMS, INC.
MERCURY FREIGHT LINES, INC.
MID AMERICAN LINES, INC.
*MILNE TRUCK LINES, INC.
MISTLETOE EXPRESS SERVICES
MOTOR FREIGHT EXPRESS, INC.
*MURPHY MOTOR FREIGHT LINES, INC.
NEW ULM FREIGHT LINES
*NOERR MOTOR FREIGHT, INC.
OBSERVER TRANSPORTATION COMPANY, INC.
*ONEIDA MOTOR FREIGHT, INC.
ONE-WAY CARTAGE SYSTEM
ORSCHELN BROTHERS TRUCK LINES
*OVERLAND EXPRESS, INC.
PENNCO TRUCKING
PERRY MOTOR FREIGHT, INC.

Note: SNFCC has established Joint Defense Groups for shippers facing undercharge claims from carriers marked with an asterisk.

PILOT FREIGHT CARRIERS
PRE-FAB TRANSIT COMPANY
*QUINN FREIGHT LINES
*REBEL MOTOR FREIGHT, INC.
REGAL TRUCKING COMPANY
RFI TRANSPORT, INC.
*RITTER TRANSPORTATION, INC.
*R.L. TRUCKING COMPANY
ROBBINS TRUCK LINE, INC.
ROBINSON TRUCK LINES, INC.
ROSE FREIGHT LINE
RTC TRANSPORTATION, INC.
*SANTA FE TRAIL TRANSPORTATION COMPANY
SAVAGE BROTHERS
*SHARM EXPRESS, INC.
SHIPWESTERN EXPRESS
SILVER WHEEL FREIGHT LINE, INC.
*SMITH TRANSFER
SW FREIGHT LINES
*SOUTHWEST MOTOR FREIGHT
*SPECTOR RED BALL
*SQUAW TRANSIT COMPANY
*STEVE D. THOMPSON TRUCKING
*SUBURBAN MOTOR FREIGHT, INC.
SUTCO TRANSPORTATION
*SYSTEM 99
TAYNTON FREIGHT SYSTEMS, INC.
TITAN TRANSPORTATION, INC.

Note: SNFCC has established Joint Defense Groups for shippers facing undercharge claims from carriers marked with an asterisk.

*TOBLER TRANSFER, INC.
TOTAL TRANSPORTATION TRUCKING, INC.
TRANSPO INTERNATIONAL, INC.
*TRANSPORTATION SYSTEM INTERNATIONAL, INC.
TRI-STATE MOTOR TRANSIT COMPANY
TUCKER FREIGHT LINES
*TWIN CITY FREIGHT, INC.
*UNITED SHIPPING COMPANY
*UNZICKER TRUCKING
*USA EASTERN, INC.
*USA WESTERN, INC.
*WENHAM TRANSPORTATION, INC.
*WESCAR FREIGHT SYSTEMS, INC.
WEST COAST TRUCK LINES, INC.
WESTERN HARVEST CARRIERS
WILSON FREIGHT
L.C. WORLEY TRANSFER, INC.
YOUNGER TRANSPORTATION

Note: SNFCC has established Joint Defense Groups for shippers facing undercharge claims from carriers marked with an asterisk.

APPENDIX B

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

I, EDWARD C. FERNANDEZ, Acting Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of all of page 1; page 2 (except lines 8 through 15); page 3 (line 1 only); all of pages 9 through 12, and page 13 (through line above heading C) of the Petition for Declaratory Order Regarding Tariffs That Contain A Range Of Discounts Or Apply To Customer Code Numbers, in No. MC-C-30117, filed July 13, 1988, the originals of which are now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 29th day of March A.D., 1990.

/s/ Edward C. Fernandez
ACTING SECRETARY OF THE
INTERSTATE COMMERCE COMMISSION

(SEAL)

BEFORE THE
INTERSTATE COMMERCE COMMISSION
ICC DOCKET NO. *MC-C-301179*

PETITION FOR DECLARATORY ORDER REGARDING TARIFFS THAT CONTAIN A RANGE OF DISCOUNTS OR APPLY TO CUSTOMER CODE NUMBERS

I. *SUMMARY OF REQUESTED RELIEF*

The Regular Common Carrier Conference (RCCC) respectfully petitions the Interstate Commerce Commission (ICC or Commission) for a declaratory order finding it unlawful for a motor common carrier of property (except household goods)[1] to publish and conduct business pursuant to a tariff that has a range of discounts that can apply to a given shipment. These types of tariffs—whether referred to as range tariffs, trigger tariffs, or write-in tariffs—have attributes in common; they contain no formula or methodology for determining which of a series of rates will apply when a given type and quantity of freight is tendered for shipment. In reality, they are an offer to negotiate a rate rather than a filed rate since no set standard for applying a rate is given. They are vague and indefinite. Consequently, they should be found to violate

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[1] This exception of motor common carriers of household goods is requested for two reasons. First, the ICC has already initiated a declaratory order addressing these tariff issues as they pertain to the household industry. See, *Andrews Van Lines, inc. et al. - Petition for Declaratory Order*, ICC Notice served July 14, 1987. Second, the binding estimate provision, 49 U.S.C. §10735, which applies solely to household goods carriers, *may* be pertinent to the legal issues presented in the *Andrews Van Lines* proceeding, but has no relevance to the issues here.

the basic statutory tariff requirements. 49 U.S.C. §§10761 and 10762. Obviously, the ICC's remedial action should be prospective because the tariff rate is the legal rate until the ICC finds otherwise. Carriers have operated under the belief that they are lawful. ***

The RCCC further requests that the ICC, upon finding these tariffs to be unlawful, order all motor common carriers of property (except household goods) to cancel such tariffs. In an effort to assist the Commission, the RCCC has attached in Appendices A & B a list of tariffs filed with the ICC during the week of May 23-27 and which would be subject to the proposed declaratory order. These tariffs were identified in an independent sampling performed for the RCCC by Don H. Norman and Associates of Vienna, Virginia. During that one week period, 34,341 individual tariff pages and 5,446 pages of agency tariffs were reviewed. Eighty-two motor carriers were identified as filing the trigger or code tariffs in question here. ***

B. *The Relevant Case Precedent*

Over the past three years, the Commission and courts have rendered a number of important decisions regarding the permissibility of certain tariff practices.

In May, 1985 the Commission denied a special tariff authority request of ANR Freight system, Inc. (ANR) because it was indefinite.[5] ANR proposed a tariff providing discounts ranging from 13 to 38 percent off the class rates. The exact percentage discount to be applied would be an "amount mutually agreed upon by the shipper and carrier(s), taking into consideration the reasonable value and characteristics of the property to be transported under the circumstances surrounding the handling and transportation." The ICC correctly concluded that this tariff was too

[5] Special Tariff Authority No. 84-500, *Negotiated Discounts, ANR Freight System, Inc.*, unprinted decision, served May 22, 1985.

indefinite. There is no way for the tariff user to determine which of the 25 discount levels would apply. The proposed "reasonable value and characteristics of the property" standard is too vague and subjective. It does not provide a definite formula by which the discount rate can be determined.

Subsequently, in June, 1985 the Commission also denied, as indefinite, a special permission application of American Freight System, Inc. (AFSI).[6] The ICC summarized the tariff proposal as follows:

> The tariff provisions which AFSI wishes to file would set out a graduated series of 99 rates ranging from 50 cents through 375 cents per loaded vehicle mile. These rates would apply on general commodities throughout the petitioner's operating territory when the petitioner has been offered, or has located, a volume or truckload shipment which would provide a revenue movement in place of an empty return of equipment. The tariff contains no formula or any other method that can be used to determine which of the 99 possible rates would be used on any given shipment. The rate to be applied is open to negotiation based on what the traffic will bear and the degree of AFSI's immediate traffic imbalance. Decision at page 1.

Because this tariff lacked a formula to determine which rate would apply, the Commission properly concluded that "the indefinite nature of the tariff proposal does not meet the minimum technical requirements of the statutes." More specifically, it failed to comport with the requirements of Sections 10761 and 10762(a)(2). It is important to note that the AFSI tariff was a write-in tariff with a range of discounts. It required AFSI to confirm in writing to the

[6] Special Tariff Authority No. 85-1852, *Excess Capacity Rates, American Freight System, inc.*, unprinted decision, served June 17, 1985.

consignor the terms of any acceptance under the discount program. In other words, the shipment may have already been moved, yet the rate not finally determined. This clearly would violate the requirement of Section 10761(a).

In October, 1985 the Commission denied a similar application of Haddad Transportation Company.[7] Haddad sought to publish a special tariff extending discounts between one and ten percent off the applicable rates to shippers. The discounts were to be based on the "value of traffic" to Haddad and the "value of service" to the shipper. To conceal the level of discount given to a particular shipper, the shippers were given a secret account number.

The RCCC protested this request arguing that it failed to comply with tariff requirements in Sections 10761 and 10762. The Commission concurred. It concluded that Haddad's proposal failed to meet even the minimal statutory prerequisite that there be a method of calculating the rate.

Probably the most important, recent court case on the tariff filing requirements is *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986). In that case, the D.C. Circuit Court reversed this Commission's decision approving a so-called "average rate tariff rule" proposed by the Freight forwarders Tariff Bureau. The tariff provided that a forwarder could agree with shippers on a rate to be determined by averaging prior charges for similar shipments. The tariff did not provide a coherent method for averaging of the past shipments. Moreover, the averaged rate was never published in a tariff with the ICC. The D.C. Circuit Court held that the tariff provision violated Section 10761 providing for a rate contained in a tariff. Judge Scalia, writing for the Court, held that tariffs are acceptable under the current law only if they permit competitors to know how a per-unit rate is deter-

[7] Special Tariff Authority No. 85-2375, *Haddad Transportation*, unprinted decision, served October 31, 1985.

mined and provide shippers with the methodology to compute the precise per unit rate to which they are entitled. 793 *supra*. at 380.

Importantly, the Court contrasted this type of tariff with volume discount tariffs. The Court noted that the latter contain a per unit measure which enables competing carriers and shippers to determine what rate would be charged when a specific volume of freight is tendered.

With a range tariff, it is impossible for either a shipper or competitor to determine which rate will apply. As in the *RCCC* case, the tariff constitutes nothing more than an offer to negotiate with shippers as to which rate will be given. Consequently, it fails to satisfy the statutory requirements.

Subsequently, the ICC invalidated three separate tariffs published by Pilot Freight Carriers, Inc., Consolidated Freightways, Corp., and Bowman Transportation, Inc. which Roadway Express challenged.[8] Although slightly different, the Commission summarized the general attributes in these three tariffs as follows:

> "(1) [they] require that shippers request participation in the program; (2) set forth a range of rates that will apply if certain traffic imbalances exist; (3) provide for the shipper to be assigned a participation number (not contained in the tariff); and (4) require carrier approval of a shipper's participation in the program. . . " (Decision at page 4).

Once again, the Commission concluded that these write-in tariffs with a range of discounts violated the requirements of sections 10761 and 10762. The Commission reasoned as follows:

[8] See, Docket No. MC-C-10971, *Roadway Express, inc.* v. *Pilot Freight Carriers, Inc., et al.*, unprinted decision, served December 6, 1986; See also, Docket no. MC-C-10975, *Roadway Express, Inc.* v. *Consolidated Freightways*, unprinted decision, served July 14, 1987.

"The tariffs challenged in the instant cases contain no formulas for determining when a particular rate will apply or how it will be computed. This appears to be a matter for the carrier and shipper to discuss based on an evaluation of traffic imbalances at the time of shipment. Thus, the rates charged by each carrier will vary according to the imbalances of traffic each carrier has in a particular traffic lane at the time when a shipper tenders a shipment to the carrier and will be determined by factors that cannot be discerned from the tariff. Hence, potential shippers will not be able to compute the precise per-unit rates to which they are entitled based solely on the tariff, although, they will be able to calculate rates once the carrier has informed them of the per mile charge. Competing carriers will not be able to know the rate or how a per-unit rate is determined based on the tariff. Accordingly, these tariffs do not meet the minimal requirement that tariffs set forth either the actual rate or the method for calculating charges, as required by *Haddad*, *supra*, and *Regular Common Carrier Conference*, *supra*." (Decision at pages 5-6).

In summary, the controlling case precedent amply demonstrates that these tariffs with a range of discounts are unlawful.***

APPENDIX C

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

I, EDWARD C. FERNANDEZ, Acting Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of that certain letter dated March 12, 1987 from T.K. Ledman to Thomas M. Auchincloss, Jr., Esq., which was an attachment to a letter-petition for a filing deadline extension submitted to the Commission under the same date by respondents in No. MC-C-30013, *A.J. Hollander Company et al.—Petition For Declaratory Order*, and No. MC-C-10961, *Primary Steel, Inc. v. Maislin Industries, U.S., Inc.*, the original of which is now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 29th day of March, A.D., 1990.

/s/ Edward C. Fernandez

ACTING SECRETARY OF THE
INTERSTATE COMMERCE COMMISSION

(SEAL)

[LETTERHEAD OF DON H. NORMAN ASSOCIATES, INC.]

March 12, 1987

Thomas M. Auchincloss, Jr., Esq.
Rea, Cross & Auchincloss
Suite 700
One Thomas Circle, N.W.
Washington, D.C. 20005-5907

Dear Mr. Auchincloss:

Reference is made to your numerous requests for rate research involving the tariffs of various motor carriers that were in effect during the period 1981 through 1983. As reported, we have been unable to complete our assignments for three principal reasons, viz.:

1. The condition of the ICC Official File.
2. Current access to the ICC Official File.
3. Required tariffs not on file at the ICC presumed to be at the Federal Record Center (Suitland, Maryland).

Several years ago the Commission eliminated its public tariff file. Since that time, the public has been required to utilize the same file as do ICC staff personnel. Subsequent to that, and due to staffing and budget restraints, the Official File is no longer maintained in a quality fashion. New pages are simply placed at the rear of the tariff within a binder, rather than substituted for the cancelled material.

Access to the official File of the Commission was extremely limited during the week of March 9, 1987, due to the recarpeting of that facility. Our tariff analysts have literally crawled over desks and boxes in order to attempt to secure particular tariffs.

Lastly, many tariff publications are simply missing from the Commission's file. We first attempt to secure tariffs from that file, checking both the current and cancelled portions thereof. If we do not locate a tariff in the current file, the assumption is that it has been cancelled and transferred to the Federal Record Center in Suitland, Maryland. The Commission's file personnel have issued requests to the Federal Record Center on our behalf for tariff publications to be brought to the Interstate Commerce Commission for our review.

While we are advised that this process takes somewhere between seven and ten days, we have found that the time required is greater because materials were furnished in error and others were simply indicated to be missing. This requires us to refile our requests and, of course, doubles the amount of time necessary to secure cancelled tariffs. We still have requests pending at the Federal Record Center and it must be assumed that, as our research progresses, we will continue to encounter these difficulties.

Very truly yours,

T. K. LEDMAN
Executive Vice President

TKL/ba